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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Parts 1, 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service)	
and Instructional Television Fixed)	File No. RM-9060
Service Licensees to Engage in Fixed)	
Two-Way Transmissions)	

**REPLY COMMENTS OF THE
COMMUNITY TELECOMMUNICATIONS NETWORK**

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EXECUTIVE SUMMARY

The Detroit metropolitan area Community Telecommunications Network (the "Detroit ITFS Group") is generally supportive of the Commission's efforts in amending its rules to enhance the ability of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to provide two-way communications services.

Despite the potential benefits to ITFS, however, the Detroit ITFS Group is concerned that certain aspects of the newly conceptualized framework for two-way communications in the MDS and ITFS services might inadvertently have the effect of degrading existing ITFS services and hamstringing the ability of ITFS licensees to expand their systems in the future. In particular, the Detroit ITFS Group is concerned that the Commission's proposed rules may not ensure that ITFS channels will remain available for the unfettered use of educational licensees, regardless of the future success or failure of the wireless cable industry.

It is critical to the successful conclusion of this proceeding -- and to the future growth of ITFS systems -- that ITFS licensees be accorded at least the same rights, protections and flexibility with respect to the use of their own licensed channels that will be bestowed on their commercial lessees. Anything less would make ITFS licensees second-class citizens on their own channels, unable to act independently to maximize the scope and breadth of their educational services. At a minimum, the Commission should extend interference protection in 35-mile protected service areas to

ITFS licensees, regardless of whether such licensees lease excess capacity to wireless cable operators.

In addition, the Commission should reject the petitioners' proposal that an ITFS licensee be required to retune to other frequencies at the whim of a wireless cable operator. While enhancing competition is, in general, a laudable goal, the adoption of this proposal would, at best, achieve only marginal competitive gain, since the availability of competitive broadband services in a given market will not depend on the ability of a wireless cable operator to retune an ITFS station. This marginal competitive gain, moreover, would be achieved at the direct and substantial expense of educators, whose existing ITFS operations -- and future growth -- could be severely hampered if this proposal is adopted.

Finally, given the number of variables and unknowns that necessarily attend the deployment of any new technology or network configuration, and because making the wrong choice is potentially disastrous for both ITFS and MDS, the Commission should err on the side of caution in fashioning the technical regulations in this proceeding.

It is imperative that the Commission recognize ITFS' future need to expand, possibly independently of wireless cable, and that the Commission ensure that any rules it adopts to achieve the goals articulated in the *NPRM* do not compromise the integrity of existing ITFS facilities or the future needs of the ITFS service.

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To: The Commission		

**COMMENTS OF THE
COMMUNITY TELECOMMUNICATIONS NETWORK
ON EX PARTE FILINGS**

Pursuant to the Public Notice, Release No. DA 98-1119, released June 12, 1998, in the above-captioned docket, the Community Telecommunications Network (hereinafter referred to as the "Detroit ITFS Group") hereby comments on various of the *ex parte* presentations submitted in this proceeding.

I. INTRODUCTION

The Detroit ITFS Group is a nonprofit corporation founded in 1989 by the Instructional Television Fixed Service ("ITFS") licensees in the Detroit, Michigan, area listed below.^{1/} The Detroit ITFS Group was created to coordinate the relevant

^{1/} The Detroit ITFS Group's members (and their call signs) are as follows: Detroit Educational Television Foundation (WHR915); Detroit Public Schools (KTB98); Macomb Intermediate School District (WHR914); Oakland Intermediate School District (WHR508); Wayne County Regional Educational Service Agency (WHR916); and Wayne State University (WAK57).

activities of these licensees, including the construction, operation and maintenance of colocated transmission and production facilities. In addition, the Detroit ITFS Group acts as the interface point between these licensees and the Detroit area wireless cable operator; the Detroit ITFS Group leases excess capacity from its individual members and subleases capacity to the wireless cable operator.

Unlike the various ITFS systems recently established primarily (if not exclusively) through the largess of a local wireless cable operator, some members of the Detroit ITFS Group operated extensive ITFS systems well before the Commission's 1983 effort to make new channel capacity available for the wireless cable industry.^{2/} Indeed, even the most recently established systems that operate under the Detroit ITFS Group umbrella were licensed at least five years prior to the establishment of a relationship with a wireless cable operator.

It is this extensive operating experience, and relative independence from commercial operators, that has enabled the Detroit ITFS Group to examine critically the Commission's proposed rules, with an eye toward ensuring that, regardless of the future success or failure of the wireless cable industry, these channels will remain available for the unfettered use of educational licensees.

^{2/} Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 F.C.C.2d 1203 (1983) ("1983 Report and Order") (reallocating the E and F groups and permitting the leasing of excess ITFS channel capacity to wireless cable).

II. DISCUSSION

A. Equal Rights for ITFS

It is critical to the successful conclusion of this proceeding -- and to the future growth of ITFS systems -- that ITFS licensees be accorded at least the same rights, protections and flexibility with respect to the use of their own licensed channels that will be bestowed on their commercial lessees. Anything less would consign ITFS licensees to second-class citizenship on their own channels, unable to act independently to maximize the scope and breadth of their educational services.

The Detroit ITFS Group is generally supportive of the Commission's efforts in amending its rules to enhance the ability of Multipoint Distribution Service ("MDS") and ITFS licensees to provide two-way broadband services.^{3/} Despite the many potential benefits of the regulatory framework contemplated in the captioned proceeding, however, the Detroit ITFS Group is concerned that certain aspects of the proposed two-way rules might inadvertently have the effect of degrading existing ITFS services and/or constraining the ability of ITFS licensees to expand their systems in the future.

What seems to have been lost in this proceeding is the realization that -- independent of the existence of a wireless cable operator (or the particulars of its business plan) -- many ITFS licensees already are planning to provide two-way broadband services to their students. Whether the Internet is used as a substantive

^{3/} See generally Reply Comments of the Community Telecommunications Network (hereinafter "Detroit ITFS Group Reply Comments").

information resource or a distance-learning transmission path, it is crucial that ITFS licensees be able to configure their educational systems to meet their students' needs regardless of -- indeed, in spite of -- the business plans of the local wireless cable operator.

For example, it may be the case in a given market (because of geography or other factors) that an ITFS licensee can deliver Internet-based services to its students more economically than can any commercial service provider (including the local wireless cable operator). A regulatory scheme that effectively would block the ITFS licensee from doing so -- forcing it to obtain from others (e.g., its own channel lessee) that which, technically, it could have provided itself -- would be both irrational and distinctly anticompetitive. A prime example of how the regulatory balance should not be tipped against an ITFS licensee's use of its own channels is discussed below.^{4/}

B. PSA Protection

As noted in the reply comments of the Detroit ITFS Group, interference protection in 35-mile protected service areas is currently granted to an ITFS licensee only when such licensee has entered into an excess capacity lease agreement with a wireless cable operator (and only during such time that the ITFS spectrum is being

^{4/} Another example of this potential imbalance involves WCAI's proposal regarding involuntary retuning. As demonstrated in detail infra, at 5-11, WCAI's proposal is utterly without merit. However, should the Commission nonetheless adopt that proposal, ITFS licensees should have the same right to retune, e.g., an MDS system as an MDS licensee has to retune an ITFS system.

employed for commercial services).^{5/} In order to provide adequate interference protection to, and preserve the future flexibility of, ITFS licensees, the Commission should, at a minimum, extend PSA protection to ITFS licensees who have such PSAs, regardless of whether such licensees lease excess capacity to local wireless cable operators. The petitioners in this proceeding appear to agree with this conclusion, and thus no rational reason exists not to afford equal protection to ITFS licensees.^{6/}

C. Involuntary Retuning

Put simply, WCAI's proposal^{7/} that an ITFS licensee be required to retune to other frequencies at the whim of a commercial wireless cable operator is flatly inconsistent with the public interest. That proposal represents an extraordinary overreaching by an industry that has spent the last fifteen years attempting to obtain a de facto reallocation of ITFS spectrum, and would, if adopted, relegate educational licensees to secondary status on their own licensed channels. There is no rationale remotely related to the public interest that would support this result.

As a preliminary matter, it is unprecedented for a third party to have the ability to require modification to another's license. Even the Commission itself cannot

^{5/} Detroit ITFS Group Reply Comments at 10 (citing 47 C.F.R. § 74.903(d)-(e)).

^{6/} See, e.g., attachment to February 25, 1998, Notice of *Ex Parte* Communication of the Wireless Cable Association International, Inc. et al. (collectively, "WCAI"); March 6, 1998, Notice of *Ex Parte* Communication of WCAI at 4-5.

^{7/} See May 15, 1998, Notice of *Ex Parte* Communication of WCAI (proposing addition to the Commission's rules of Sections 21.901(d)(1) and 74.902(k)).

require a licensee to modify its facilities without first making a particularized public interest finding and fulfilling certain due process requirements.^{8/}

The precedents cited by WCAI in support of its involuntary retuning proposal are unrelated to the present case.^{9/} All involved prior determinations by the Commission that modification to the license of an individual licensee or specified group of licensees would serve the public interest. The public interest factors considered by the Commission included, inter alia, that: (1) the modification would facilitate the introduction of a new service to the public; (2) spectrum of comparable quality was available to the incumbents whose licenses would be modified; (3) the spectrum in question was best suited for the new service; and/or (4) sharing with incumbents was not feasible.

None of these factors is present here. For example, the availability of competitive broadband services in a given market will not turn on the ability of a wireless cable operator to retune an ITFS station. Even if it is assumed arguendo that, in the absence of such power, a given operator might be unable to assemble all of the ITFS spectrum in a given market, there is no reason to believe that potential customers

^{8/} See 47 U.S.C.S. § 316 (1998). While a compelling argument can be made that, as a matter of policy, the Commission already has accorded wireless cable licensees far too much power under Section 74.986 of the Rules, that rule at least pays due deference to the requirements of Section 316. The current proposal quite clearly does not.

^{9/} See June 10, 1998 Notice of *Ex Parte* Communication of WCAI (attaching discussion in support of involuntary retuning from WCAI's January 8, 1998 comments in this proceeding).

in that market will be deprived of a plethora of competitive broadband solutions. It must be recalled that wireless cable represents merely one of several competitors for the provision of new wireless data services either presently available or soon to be deployed (e.g., DEMS, LMDS, and services from both GEO and NGSO satellite systems) to compete against various "wired" solutions. While enhancing competition is, in general, a laudable goal, doing so at the direct and substantial expense of educators for, at best, marginal competitive gain, is irrational.

Moreover, it is purely fictional to suggest, as some proponents of the rule do, that, without the right to force ITFS licensees to retune, one recalcitrant ITFS licensee could block the deployment of widespread 2.5 GHz broadband services in a particular market. While it may have been the case in the analog video world that one such ITFS licensee could block the development of a competitive wireless cable video system, there is more than adequate bandwidth available to work around that ITFS licensee in a digital world. The loss of a channel group will not hamstring the deployment of a fully competitive 2.5 GHz broadband system.

On the other hand, forcing an ITFS licensee onto a different channel could severely hamper existing ITFS operations -- let alone future growth -- in a number of respects. Not all ITFS spectrum is equal. Co-channel and adjacent channel problems vary widely from channel group to channel group, and market to market, based on, e.g., terrain, reflection problems, and adjacent market operations. ITFS licensees required to retune could face severe degradation in service, substantially

increased operating costs, or disruption of cooperative arrangements with other ITFS systems (and/or non-licensee educational institutions) in the same or neighboring markets.

The only certain conclusion that can be drawn in this case is that bestowing the retuning power on wireless cable operators will ensure the continued vitality of the law of unintended consequences. The Commission must recognize that it is not writing on a clean slate here. Over the past decade, hundreds of new ITFS systems have initiated operations and established extensive relationships with other educational institutions. Wireless cable operators should not be permitted to disrupt existing services and plans for future growth and diversification of educational services.

In the absence of any even remotely compelling competitive rationale for reducing educators to second-class citizenship on their own channels, the Commission must hew to its historic policy of preserving the integrity of the ITFS allocation. The Commission has always found that the educational mission of ITFS should take precedence over the delivery of entertainment and other commercial services. Indeed, even when the E and F groups were reallocated from ITFS to MDS in 1983, in order to "create" a viable wireless cable industry, ITFS E and F group licensees were grandfathered rather than forced to relocate.^{10/} Only after it became very clear that

^{10/} See, e.g., 1983 Report and Order at ¶ 4. See also Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay
(continued...)

these grandfathered systems could be moved to new channels without adverse consequence was Section 74.986 adopted with, as noted supra, significant procedural safeguards not present in the instant proposal.^{11/}

Indeed, in adopting Section 74.986, the Commission specifically “rejected proposals that would substantially benefit wireless cable because of their potentially negative impact on ITFS.”^{12/} In that proceeding, as noted supra, a

^{10/} (...continued)
Service, 6 F.C.C. Rcd. 6792, at ¶ 5 (1991) (“Second Report and Order”) (offering regulatory flexibility to wireless cable only while “protecting and enhancing current and future ITFS service”); Amendment of Parts 21, 43, 74, 78 and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 F.C.C. Rcd. 6410, at ¶ 7 (1990) (“1990 Report and Order”) (“The modifications adopted here should not jeopardize the current or future ability of ITFS ... to provide educational material for instructional use. On the contrary, we believe that these changes will enhance ITFS...”).

^{11/} See supra note 9. Moreover, as discussed above, in a digital context, the presence of, e.g., an uncooperative grandfathered E-group licensee would not materially affect the development of a robust, competitive 2.5 GHz broadband system. Thus, the fact that the limited involuntary modification provisions set out in Section 74.986 were adopted in 1991 provides no support for the proposition that a far more draconian rule should be adopted in 1998. Indeed, if anything, the move to digital undermines whatever justification initially existed for Section 74.986.

^{12/} Second Report and Order at ¶ 5. See also id. at ¶¶ 1, 2 (in affording wireless cable a more accommodating regulatory framework, the Commission noted that “our underlying concern has been and remains ‘the critical importance of education, and the significant role that ITFS can play in providing improved educational opportunities for all’ (quoting Further Notice of Proposed Rulemaking in Gen. Docket No. 90-54, 5 F.C.C. Rcd. 6472 (1990), and in crafting rules that would strengthen wireless cable, the Commission sought to

(continued...)

regulatory scheme permitting limited involuntary modification of ITFS facilities was adopted, but only with significant safeguards grounded in statute. Most importantly, the Commission expressly rejected the argument then made by WCAI -- and resurrected in the instant proceeding -- pursuant to which WCAI would sacrifice ITFS viability on the altar of "spectral efficiency."^{13/}

Moreover, forcing ITFS licensees to contest retuning is inconsistent with the Commission's recognition that "educational institutions should be treated differently than commercial entities.... [D]ue to limited financial and staff resources, governmental constraints, and similar factors," ITFS licensees may not be able, for financial and other reasons, to devote resources to such adjudicative purposes.^{14/} Any resources spent defending against involuntary license modifications would directly reduce the amount of money spent on education. In short, the Commission's goal of providing "the opportunity for distance learning to become commonplace" would be severely hampered if ITFS licensees were required to modify their operations at the behest of a wireless cable operator.^{15/}

^{12/} (...continued)
ensure that "the viability of ITFS as a significant educational tool" would be protected); 1990 Report and Order at ¶ 7.

^{13/} Second Report and Order at ¶ 22, n.16.

^{14/} 1990 Report and Order at ¶ 7.

^{15/} Second Report and Order at ¶ 5.

In the end, it is clear that WCAI confronts the Commission with a false dilemma. No adverse public interest consequence will result from a rejection of the retuning proposal, and significant and lasting harm to various ITFS licensees may result from its adoption. In the absence of this proposed rule, a wide array of competitive broadband services will nonetheless be available, including from wireless cable operators. The unprecedented power over ITFS sought by WCAI is patently unnecessary to either the rapid evolution of a competitive marketplace or the success of digital MDS operators. The MDS industry's seemingly insatiable appetite for ITFS spectrum, while certainly understandable, simply can no longer be accommodated. There is no public interest basis that would support -- let alone compel -- the rule sought by WCAI.

D. Interference Concerns

A final concern overarches all of the foregoing issues: the question of interference. If the Commission's ultimate judgment regarding the extent of interference to ITFS systems that may result from the deployment of cellularized two-way commercial systems proves overly optimistic, none of the rest of what is decided here will matter. Existing ITFS service will be substantially disrupted, future expansion plans will be thwarted, and commercial broadband wireless cable services may never be deployed.

Obviously, the two chief protagonists on this issue, WCAI and the Catholic Television Network ("CTN") -- each supported by an armada of highly

qualified engineers -- hold different views on both the likelihood of destructive interference to ITFS services that would result under WCAI's technical plan and the best means to avoid such interference. The Detroit ITFS Group does not pretend to know which of the parties is correct.

Indeed, given the number of variables and unknowns that necessarily attend the deployment of any new technology or network configuration, it is highly unlikely that any party has the right answer. The problem for the Commission -- and for thousands of ITFS and MDS licensees -- is that making the wrong choice is potentially disastrous for both groups. Thus, the Detroit ITFS Group would urge the Commission to err on the side of caution in fashioning the technical regulations, particularly the extent to which a wireless cable operator can act unilaterally, without prior Commission review and consent. A year or two from now, with the benefit of practical experience, the Commission could revisit the issue if need be, or address particular cases by waiver, if the regulations prove unnecessarily constraining. Erring in the other direction could have potentially irreversible adverse consequences for wireless cable and could prove highly disruptive to existing and future ITFS services.

CONCLUSION

The Detroit ITFS Group supports the Commission's goals in this proceeding, but cautions the Commission that recognition of ITFS' future need to expand -- possibly independently of wireless cable -- is indispensable. The Commission should ensure that any rules it adopts in the captioned proceeding do not compromise the integrity of existing ITFS facilities or the future needs of the ITFS service.

Respectfully submitted,

COMMUNITY TELECOMMUNICATIONS NETWORK

By:

A handwritten signature in black ink, appearing to read 'Jeffrey H. Olson', written over a horizontal line.

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